SHER TREMONTE LLP

September 18, 2016

VIA ECF

The Honorable P. Kevin Castel
United States District Judge
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

Re: *United States v. Gary Hirst*, 15 Cr. 643 (PKC)

Dear Judge Castel:

We write in response to the government's disclosure of Stephen Flatley as an expert witness on metadata. We take no issue with the disclosure or the government's intention to call its own metadata expert. However, because the government's disclosure makes clear that Mr. Flatley is solely a rebuttal expert, we respectfully request that the Court preclude the government from calling Mr. Flatley in its case-in-chief. In addition, we respectfully request that the Court preclude Mr. Flatley from testifying that the FBI does not rely solely on a "create date" contained in metadata when determining the date on which a document was in fact created.

The government's letter states that Mr. Flatley will testify that that the document "Shahini warrant.pdf," which was attached to a September 28, 2010 email from Stephen Weiss to Shant Chalian, includes metadata indicating that the document was created using a scanner and bears a "create date" of April 9, 2010. The government's letter states that Mr. Flatley will also testify that the FBI does not rely solely on a create date contained in metadata when determining when a document was in fact created, and instead requires other corroborating facts. It is also states that he will testify that create dates are considered unreliable because it is possible to manipulate them in various ways. The government's letter does not indicate that Mr. Flatley will testify that the metadata in this case was in fact manipulated in any way. Nevertheless, based on the theoretical possibility of manipulation, the government advises that Mr. Flatley will opine that no conclusion can be drawn from the metadata attached to the Shahini warrant document.

"The function of rebuttal testimony is to explain, repel, counteract or disprove evidence of the adverse party." *United States v. Lamoreaux*, 422 F.3d 750, 755 (8th Cir.2005) (citation omitted); *accord Faigin v. Kelly*, 184 F.3d 67, 85 (1st Cir.1999) ("The principal objective of rebuttal is to permit a litigant to counter new, unforeseen facts brought out in the other side's case.") (citations omitted). "As such, rebuttal evidence may be used to challenge the evidence or theory of an opponent—and not to establish a case-in-chief." *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 759 (8th Cir. 2006). "It is typically the case that evidence presented in defense to a claim would be 'rebuttal' evidence; if it is not, it would be, in effect, irrelevant under Rule 401." *In re Puda Coal Sec. Inc., Litig.*, 30 F. Supp. 3d 230, 252 (S.D.N.Y. 2014); *see also Cates v. Sears, Roebuck & Co.*, 928 F.2d 679, 685 (5th Cir.1991) ("Rebuttal must be kept in perspective; it is not to be used as a continuation of the case-in-chief."); *Allen v. Prince George's Cty.*, 737 F.2d 1299, 1305 (4th Cir.1984) ("Ordinarily, rebuttal evidence may be introduced only to counter new facts presented in the defendant's case in chief.") (citing John Henry Wigmore, Evidence in Trials at Common Law § 1873 (1976) ((a district court should allow rebuttal evidence only if it is necessary to refute the opponent's case)).[1]

Mr. Flatley's testimony is classic rebuttal testimony. He will present testimony to explain and challenge Mr. Hirst's metadata evidence by raising general questions about the reliability of metadata. Such testimony from an expert is not improper in rebuttal, but it strains the limits of relevancy and is likely to confuse the jury if presented in the government's case-in-chief. Indeed, if the jury first hears of the metadata evidence in the government's case, in the context of testimony of the various ways that metadata can be easily manipulated, it is likely to assume that the evidence is incriminatory, or somehow supports the government's theory of the case, when in actual fact the evidence is being offered for the sole purpose to explain away exculpatory evidence. Taking the witnesses out of order in this case acutely raises the danger of confusion and unfair speculation by the jury.

That danger is easily avoided. A district court has broad discretion to determine the order of trial. *See Geders v. United States*, 425 U.S. 80, 86 (1976) (recognizing need to afford trial judge broad discretion to "determine generally the order in which parties will adduce proof"); *United States v. Bok*, 156 F.3d 157, 166 (2d Cir.1998) (recognizing district court discretion to admit similar act evidence during government's case-in-chief rather than on rebuttal where it is apparent that defendant will dispute issue of intent). Rule 611(a) of the Federal Rules of Evidence provides that the "court should exercise reasonable control" over the "order of examining witnesses" to promote the effective determination of the truth and to avoid wasting time. Fed. R. Evid. 611(a). Because Mr. Flatley will exclusively offer rebuttal testimony, the Court should direct the government to call him in its rebuttal case, rather than its case-in-chief.

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[1] While only the Federal Rules of *Civil* Procedure explicitly acknowledge a distinction between primary and rebuttal experts, *see* Fed. R. Civ. P. 26(a)(2)(D)(ii), courts recognize this distinction in the criminal context, noting that the Federal Rules of Criminal Procedure's disclosure rules apply only to experts to be offered in the government's case-in-chief, and not rebuttal experts. *See United States v. Beilharz*, 378 F. App'x 363, 365 (4th Cir. 2010); *cf. United States v. White*, No. 15-12025, 2016 WL 44473224 (11th Cir. Aug. 25, 2016), Trial Tr. 22, 157-58 (offering to reopen defense case to allow defendant to put on expert witness that the court had previously precluded as irrelevant, where defendant's testimony had opened the door to government's rebuttal expert).

Indeed, the government can either elicit the ways in which metadata can be manipulated on cross examination of the defense's expert, John Shumway (who will essentially agree with Mr. Flatley's assertions about the potential to manipulate metadata) or in its rebuttal case. Following this order will avoid the risk of confusion by the jury and will make the examination of both experts "effective for the determination of the truth." Fed. R. Evid. 611(a); *see Lis v. Robert Packer Hosp.*, 579 F.2d 819, 823 (3d Cir. 1978) (trial courts have discretion to call witnesses out of order "[i]f convinced that practical reasons justify calling a witness out of turn and that the testimony will not produce undue confusion in the minds of the jurors"). Accordingly, consistent with Rules 401, 403, and 611, the Court should preclude the government from calling Mr. Flatley in its case-in-chief.

At whatever stage of the trial Mr. Flatley testifies, he should be precluded from testifying that the FBI does not rely on "create date" metadata exclusively to determine when a document was actually created. The standard that the jury should apply is not that of the FBI, but rather the "commonsense judgment of a group of laymen." *Williams v. Florida*, 399 U.S. 78, 100 (1970). The metadata inherent in the Shahini warrant is but one piece of evidence for the jury to evaluate. It is solely the province of the jury to decide how much weight and what inferences, if any, to draw from the metadata evidence. *See United States v. Toscano*, 166 F.2d 524, 526 (2d Cir. 1948) ("The weight of the evidence and the conflicting inferences which might be drawn from the testimony [are] questions for the jury."). To permit an FBI agent to testify about the Bureau's standard for evaluating the weight of a particular piece of evidence, and then to opine that no conclusion can be drawn from it, usurps the role of the jury. *See Untied States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994) ("When an expert undertakes to tell the jury what result to reach, this does not *aid* the jury in making a decision, but rather attempts to substitute the expert's judgment for the jury's.").[2] Accordingly, the Court should preclude the government from eliciting testimony from Mr. Flatley about how the FBI evaluates the reliability of metadata.

Respectfully submitted,

/s/
Michael Tremonte
Justine A. Harris
Noam Biale

Counsel for Gary Hirst

cc: Brian Blais (via ECF)
Rebecca Mermelstein (via ECF)
Aimee Hector (via ECF)

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[2] In any event, Mr. Flatley's opinion does not follow from his premises, since in this case there is evidence that both tends to corroborate and to undermine the conclusion that the "create date" is accurately indicated in the metadata.